Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-757

OLD DOMINION FREIGHT LINE, INC.
and
BARNES TRUCK LINE, INC.,
v. *Appellants*
UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION
and
COLONIAL MOTOR FREIGHT LINE, INC., et al.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina, Greensboro Division

MOTION TO AFFIRM OF APPELLEE COLONIAL MOTOR FREIGHT LINE, INC.

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Pursuant to Rule 16(1)(c) of the Supreme Court Rules, Appellee Colonial Motor Freight Line, Inc. ("Colonial") [1] moves the Honorable Court to affirm

[1] Colonial was a party protestant in the proceeding complained of before the Interstate Commerce Commission ("Commission") and an intervenor-defendant in the Court below.

the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.[2]

PRELIMINARY STATEMENT

Appellee Colonial takes no exception to the Jurisdictional Statement references to OPINION BELOW, JURISDICTION, and STATUTES INVOLVED. It believes that the only question presented on this appeal is whether the Commission's action, findings, and conclusions were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law or supported by substantial evidence. Administrative Procedure Act, Sec. 706(2); 5 USC Sec. 706(2); *Bowman Trans.* v. *Arkansas Best Freight*, — U.S. —, 42 L.Ed. 2d 454, 455 (1974), rehearing denied, 43 L. Ed. 2d 433 (1975). For the purposes of this Motion, however, argument below is drawn along the lines of the questions presented and argument of the Jurisdictional Statement. The statement of the case is accurately reflected in Appendices C and D to the Jurisdictional Statement.

ARGUMENT

I. The Bases of the Commission's Finding of Partial Dormancy Are Made Clear and Are Consistent with Its Pertinent Prior Decisions

Appellants' contentions that in arriving at its conclusion of partial dormancy in the rights of Barnes Truck Line, Inc. ("Barnes") transferable to Old

[2] *Zucht* v. *King*, 260 U.S. 174, 176 (1922); *Sugarman* v. *U.S.*, 249 U.S. 182, 184 (1919); *Equitable Life Assurance Soc. of the U.S.* v. *Brown*, 187 U.S. 308, 311 (1902).

Dominion Freight Line, Inc. ("Old Dominion"), the Commission "failed to apply established standards for determining transferability," "failed to follow the substantiality test,"[3] and failed to announce and explain a departure from "long adhered to standards or policies" (Juris. Stmt., pp. 9-16) are without merit.

Beginning with the report and order of the Administrative Law Judge and repeatedly in each subsequent Commission order complained of, the decisional rationale was made clear. In this regard, three principles are of utmost importance for consideration: First, the Barnes' certificates sought to be transferred authorize the transportation of the broadest type commodities (general commodities) on a statewide basis between all points in North Carolina, South Carolina and Virginia, on the one hand, and, on the other, points in southeastern Pennsylvania and Baltimore, Md. The Commission has held in analogous cases that where such broad rights are sought to be transferred, applicants have a "heavier burden to prove the operating rights were active than in most cases. Such rights, if really active, could attract a large volume of traffic in this area."[4] Secondly, the sole statutory criterion governing the disposition of the acquisition proposed is whether the transaction is "consistent with the public interest."[5] In *Virginia Stage Lines, Inc.* v. *U.S.* (D.C.W.D. Va. 1942), 48 F.Supp. 79, 82, Circuit

[3] As enunciated by the Commission in *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc.*, 75 M.C.C. 659 (1958).

[4] *Glosson Motor Lines, Inc.—Purchase—Helderman*, 101 M.C.C. 151, 158 (1966).

[5] Sec. 5, Interstate Commerce Act, 49 U.S.C. § 5.

Judge Dobie, speaking for a statutory three-judge court on review of Commission orders, observed:

> "It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than Section 5 of the Interstate Commerce Act"

He also quoted from this Court's opinion in *Alton Railroad Co.* v. *U.S.*, 315 U.S. 15, 23 (1942), that:

> "The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the courts."

And, third, the question of dormancy is one of fact. *Miami Transp. Co. of Ind.—Purchase—Strothman*, 97 M.C.C. 600, 608 (1964); *Blue Ridge Transfer Co.* v. *U.S.*, 283 F.Supp. 858, 860 (D.C.W.D. Va. 1968).

The Administrative Law Judge expressly found that the three general commodity carrier protestants (including Colonial) recognized that the Barnes rights are not dormant insofar as actually operated. He continued (Juris. Stmt., App. D, p. 53a) that:

> "They are on solid ground when they argue that, as alternative to complete denial, Barnes general commodity rights which are practically dormant, should be cancelled except. . . . (3) as to limited commodities, principally iron and steel and iron and steel articles from the described area in southeastern Pennsylvania and Baltimore, and lumber, flakeboard, pulpboard, sheets and boards, and millwork from the southeastern area to the described northern points."

He further found:

> "Going beyond the interest of each protestant, the focal aspect of this proceeding is the use to which OD would put BTL's rights in Virginia and the Carolinas-blanketing them with a small-shipment, general commodity peddle-service. It is no answer to the objection of protestants regarding the Brady criteria, supra, to say as does OD, that it may move to have BTL's irregular-route rights converted to regular-route rights between its principal points, when the statement comes before the obvious fact. It is clear from OD's frankly stated intentions, and its express showing, that it would use, and under temporary control is using, BTL's rights in a manner not intended."[6]

This latter quotation relates to the proposal of Old Dominion to overlap within Virginia and the Carolinas its existing regular-route, small shipment, general commodity service with an irregular-route service authorized under the Barnes certificates, thus constituting a new service and, indeed, one not intended by reason of the nature of the irregular-route certificates of Barnes.

He made detailed findings with respect to facts bearing on the issue of dormancy in regard to lack of terminal expenses, type of equipment operated, absence of terminals within the Barnes system with which to handle less-truckload general commodity traffic and other seemingly minutiae but bearing on the issue of dormancy (Juris. Stmt., App. D, pp. 16a-20a, 22a-24a, 26a, 30a-34a, 36a-53a, incl.). All of the evidence sup-

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[6] Citing *Falwell Fast Frt., Inc. —Pur.—Draper and Evans Line, Inc.*, 40 M.C.C. 439, aff'd, *Falwell* v. *United States*, 69 F.Supp. 71, aff'd *per curiam*, 330 U.S. 807.

porting these findings (to which appellants have not taken exception) support his conclusion that the general commodity rights should be cancelled with the stated exceptions.

Moreover, he reviewed judicial construction of the phrase "consistent with the public interest" and observed that those statutory words comprehended the interest of competing carriers, and the Commission considers the interest of such carriers, as well as the advantages and disadvantages which may accrue to the general public, citing *Mushroom Transp. Co., Inc.-Control-Smith & Howell Film,* 87 M.C.C. 584, 589 (1961) and *Matlack, Inc.-Control-Southern & T.I. McCormack,* 109 M.C.C. 861 (1971). Both of those cited cases dealt with the question of dormancy. In both cases, the test of substantiality as enunciated in the *New Dixie* case, *supra,* was cited and applied.[7] Each subsequent order of the Commission as pertinent to the issue of dormancy within the context of this appeal adopted the findings and conclusions of the Administrative Law Judge and added independent findings on the Commission's part (Juris. Stmt., App. D, pp. 59a, 71a, 79a, 81).

There is clearly a rational basis for the conclusions reached by the Commission in this case. *Mississippi Valley Barge Line Co.* v. *U.S.,* 292 U.S., 282 (1934).

2. The Wright Trucking Decision Is Distinguishable

Appellants' contention that there is a conflict between the decision of the District Court below and that of the statutory three-judge District Court of Mas-

[7] It was pointed out at oral argument before the Court below that the Administrative Law Judge who heard the instant case also heard the *New Dixie* case in which the test of substantiality was first articulated.

sachusetts in *Wright Trucking, Inc.* v. *U.S.* (C.A. No. 73-1445-C, April 3, 1975) is erroneous. Appellants bottom their contention on the proposition that the District Court below simply affirmed the Commission's Decision and Orders without comment on or discussion of the issues raised by appellants, thereby tacitly approving the Commission's dormancy determinations without application of its traditional substantiality test. That the Administrative Law Judge and the Commission made findings, all of which were supported by substantial evidence, bearing on standards in determining dormancy has been demonstrated above. Bearing in mind that the so-called "substantiality test" requires than an irregular-route carrier such as Barnes must submit evidence showing that it has rendered *substantial* service to a *representative* number of points within its territory to show that its operations have been *substantial* and *continuous,* as distinguished from occasional or sporadic, it is clear that the Commission adhered to that test of substantiality in the instant case.

The Court in the *Wright* case simply found that the Commission had failed to explain the basis of its decision. There is no such absence of explanation in the instant case. As has been pointed out, the Commission in *Miami Transp. Co., Inc. of Ind.—Pur.—Strothman,* 97 M.C.C. 600, 608 (1964), held that the test of substantiality enunciated by the *New Dixie* case is not a yardstick whereby the Commission can measure the operations and say that less than "x" shipments daily or monthly equals dormancy. The test, the Commission said, was elastic, and that the number of shipments held to amount to dormancy in one case will vary from that in another.

In view of the extraordinarily broad administrative discretion delegated to the Commission by Congress un-

der Sec. 5 of the Act. *Wright* may not be considered to be in conflict with the decision below. Each case must stand on its own record.

3. The Commission's Decision Is Not Inconsistent with Its Earlier Decision in the Coker Case

Appellant contends that the Commission's actions herein are arbitrary and capricious because it had earlier authorized the transfer of the Barnes' rights in *Barnes Truck Line, Inc.—Purchase—Coker Freight Line, Inc.*, Docket No. MC-F-9343. The thrust of this argument is that the Commission's decision is inconsistent with that in the *Coker* case and that the Commission is, in effect, estopped from finding dormancy in the instant case. This argument is without merit for the following reasons:

A. The doctrine of *res adjudicata* is not applicable in connection with the exercise of the Commission's quasi-judicial functions. *Arco Auto Carriers, Inc. Ext.—Milwaukee*, 49 M.C.C. 731, 770 (1949); *Monumental Motor Tours, Inc. Ext.—23 States*, 77 M.C.C. 259, 262 (1958); *Capitol Bus Co. Ext.—Elmira—Wilkes-Barre*, 83 M.C.C. 559, 560-561, 564 (1960); *Carl Subler Trucking, Inc. Ext.—10 States*, 77 M.C.C. 633-635 (1958).

B. It is not the function of a reviewing court to determine whether a Commission's decision is consistent with other rulings. *Virginian Railway Co.* v. *U.S.*, 272 U.S. 658; *Virginia Stage Lines* v. *U.S.*, 48 F.Supp. 79 (W.D.Va. 1942).

C. The "new service" potential of Old Dominion, a less-truckload general commodity carrier in the truest sense, in the acquisition of the broad Barnes rights is a factor recognized by the Commission in the instant

case and held to be of decisional significance. This new service potential was not present in the Barnes acquisition of the Coker rights by reason of the historically limited manner in which Barnes had been operated, i.e., through limiting its operations to truckload service, utilizing no terminals operationally required for the handling of less-truckload traffic, utilizing flatbed trailers primarily (not suitable for general commodity freight), and transporting freight on a highly selective basis, both in terms of commodities and territory.

4. The Commission Approved the Transfer of All Operating Authority Where Applicants Had Met the Substantiality Test.

Appellants' reliance on *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), is misplaced. Appellees have never admitted that Barnes handled numerous shipments of commodities other than iron and steel articles southbound and lumber and related items northbound under the involved general commodity authority on a substantial basis to a representative number of points within the pertinent territory. Colonial's position from the very outset of the proceeding before the Commission was that Barnes in the past under the general commodity authority had limited its service essentially to the transportation of these type commodities and the proof adduced in evidence by Barnes discloses that in the movement of traffic other than the type approved for transfer, its operations had been extraordinarily occasional, sporadic or non-existent. The limiting of Barnes' actual service and indeed its holding out was corroborated by testimony of record before the Commission of the surviving Barnes brother. In addition, analyses of appellees' own traffic abstracts demonstrated the extraordinarily limited operations

performed under the pertinent general commodity rights. In *United States* v. *Carolina Freight Corp., supra,* this Court was concerned with the interpretation of Sec. 206(a) of the Interstate Commerce Act with respect to whether a carrier had been in "bona fide operation" during the critical statutory periods with regard to the issuance of grandfather certificates. As related to territorial limitations placed on the grandfather grant in that case, at 315 U.S. 480, 481, this Court observed:

> "The Act provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald v. Thompson, 305 U.S. 263. *Substantial as distinguished from incidental, sporadic, or infrequent, service is required.* Substantial service actually rendered may have been confined to narrow limits. Loving v. United States (DC) 32 F.Supp. 464, affirmed in 310 U.S. 609, 84 L.ed. 1387, 60 S.Ct. 898. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed." (Emphasis supplied.)

With regard to the commodity restrictions imposed in the grandfather certificate there involved, the Court also observed (315 U.S. 483):

> "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities. See Re Galveston Truck Line Corp. 22 M.C.C. 451, 467. Or the service actually rendered may have been confined to such a few commodities that his holding out or willingness to carry a much larger class may be disregarded. Loving v. United States (DC) 32 F. Supp. 464, affirmed in 310 U.S. 609, 84 L.ed. 1387, 60 S.Ct. 898, *supra,* was such a case."

The evidence of record therefore demonstrates that other than only on incidental, sporadic or infrequent occasions, Barnes had transported on a substantial basis only those commodities which the Commission approved for transfer. There is absolutely no conflict between the actions of the Commission in the instant case and this Court's holdings in the *Carolina Freight Carriers Corp.* case.

Nor is the Commission's decision here in conflict with other Commission decisions as contended by appellants (Juris. Stmt., pp. 24, 25). Contrary to the statement of appellants, Colonial contended from the outset that the only commodities transported by Barnes on a substantial basis to representative points were those authorized for transfer by the Commission. To the extent that Barnes participated in the transportation of any other commodities, such services was at best sporadic or occasional, and certainly insufficient to meet the test of substantiality. As indicated above, the Administrative Law Judge made express findings with regard to the failure of appellants to demonstrate that the general commodity authority sought to be transfered had been fully operated. Similarly, the Commission itself found:

> "The the evidence of record, particularly applicants' shipping abstracts at Exhibits 71-72 show that of approximately 500 shipments carried in the period December 1968 through May 1969, under special commodity authority, virtually all consisted of lumber and related products, so that Barnes' specified commodity authority was dormant for all practical purposes except for the

transportation of lumber, flakeboard, pulpboard and other lumber-related commodities from North and South Carolina and the 'uncontested' area of Virginia, *a situation consonant with the use of Barnes' general commodity authority based in the Carolina, which was also used largely for transporting lumber-related commodities;* that no shipper testimony was presented to justify reactivation of the dormant rights." (Emphasis supplied.) (Decision and Order served January 11, 1974, Juris. Stmt., p. 59a)

And again in its Order served November 6, 1974 (Juris. Stmt., p. 71a), the Commission found that:

"Even though the vendor showed some shipments under those portions of its authority that had been ordered cancelled, the number of shipments are insignificant and are not sufficient caliber to justify classifying the authority as active, and that applicants have not submitted evidence to justify reactivation of the dormant rights or shown the decision and order of December 19, 1973 to be in error;"

Appellants would have this Court (as they did the Court below) weigh the evidence adduced herein and substitute its judgment as to whether traffic abstracts offered in evidence before the Commission showed sufficient traffic to meet the test of substantiality. This is simply not the function of this Court. *Alton Railroad Co. v. U.S., supra; Miami Transp. Co. of Ind.—Pur.—Strothman, supra.*

5. The Commission Considered All Relevant Evidence and Its Refusal To Reopen the Record for Further Hearing Was Not an Abuse of Discretion.

Appellants' contention that the Commission's dormancy findings "struck the very heart" of the Barnes operating authority, i.e. its general commodity author-

ity, and as a result of such findings, carrier employees would be adversely affected is at war with the facts and otherwise erroneous.[8] The evidence of record demonstrates that prior to coming under the influence of Old Dominion under temporary management, Barnes never conducted a general commodity operation but rather limited its transportation activities to the movement of highly selected commodities essentially on flat-bed trailers and to a highly selective territory. Barnes had only two employees at Baltimore, with a number of drivers being available for utilization in the southbound transportation of iron and steel articles, but had no dockmen stationed there who normally would be utilized in the dockhandling of general commodity freight. In fact, except for the Barnes facility at Wilson, N.C. (its home office), Barnes had never operated a facility anywhere which was suitable for the handling of less-truckload general commodity freight. While appellants estimate that 100 employees will be laid off as a result of the Commission's order requiring cancellation of the Barnes' east-south general commodity authority, the record demonstrates that such employees were added

[8] With respect to the adverse affect on Colonial resulting from Old Dominion's continued temporary operations of Barnes, Colonial's Vice President—Traffic submitted an affidavit to the Court below in opposition to appellees' Motion for Temporary Restraining Order in which he pointed out that his company had suffered substantially with regard to loss of traffic by specific shippers during the period of temporary operations of Barnes by Old Dominion, that during the last seven months of 1974, his company's total system revenues had decreased dramatically ($624,094 in June to $373,733 in December). With specific regard to Colonial's operations to and from Baltimore and the south, he showed substantial reduction in tonnage and revenue for the last three months of 1973 to the last three months of 1974. He also demonstrated that his company had to park 30 expensive van trailers simply because it did not have enough revenue traffic to fully utilize them.

by Old Dominion after it took over temporary operations of Barnes. Indeed, in its amendment to the application from one of control to one of merger filed with the Commission on December 4, 1972, Old Dominion stated:

> "E-5. During the period of temporary authority opportunities for the employees of both transferor and transferee have expanded. Accordingly, it is believed that approval of the transaction will not adversely affect any carrier employees."

In short, the build-up of employees during temporary operations was brought about at the election of Old Dominion in the face of continuing adverse decisions of the Commission on the issue of dormancy.

With respect to the appellants' contentions that the Commission failed to consider operations under temporary authority and shipper affidavits, this argument merely attacks the propriety of the Commission's refusal to reopen the record for further hearing. Appellants have not and cannot demonstrate that such refusal was an abuse of the Commission's broad discretion in this area. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, —— U.S. ——, 42 L.Ed.2d 447 (1974), rehearing denied, 43 L.Ed.2d 433 (1975).

CONCLUSION

For the foregoing reasons, the Memorandum of Decision and Judgment of August 15, 1975, and Final Judgment entered on September 8, 1975, by the Court below, affirming orders of the Interstate Commerce Commission in MC-F-10522, *Old Dominion Freight Line—Control—Barnes Truck Line, Inc.*, should be affirmed.

Respectfully submitted,

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